

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

DOREEN CAMERON,

Plaintiff,

Case No. 2005-3161-NI

vs.

PAUL E. BLACKABY and WASTE
MANAGEMENT OF MICHIGAN, INC,
jointly and severally,

Defendants.

OPINION AND ORDER

Defendants moved for summary disposition under MCR 2.116(C)(10).

According to plaintiff's complaint filed August 8, 2005, she was involved in a motor vehicle accident with defendant Blackaby on May 10, 2004, in which she allegedly sustained severe injuries. Defendants now move for dismissal on the basis that plaintiff's injuries do not meet the threshold to sustain a claim under MCL 500.3135, *et seq.*

Standard of Review

In a motion brought under MCR 2.116(C)(10), the record is considered in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists that precluding granting judgment as a matter of law to the moving party. *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005). Once the moving party has met the initial burden by supporting its position with documentary evidence, the burden shifts to the nonmoving party to establish the existence of a genuine issue of fact. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A genuine issue of fact exists when the record



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leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Applicable Law

Under MCL 500.3135 (1), a person is subject to tort liability for noneconomic loss caused by his or her "use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). As used in this section, "serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7); *Id*.

In order to be objectively manifested, there must be a medically identifiable injury that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652; 654 NW2d 604 (2002). Subjective complaints of injury can support a claim of serious impairment of body function, but only if there is a physical basis and an expert diagnosis to support the subjective claim. *Id* at 650.

Our Supreme Court has provided a framework to use for determining whether a plaintiff meets the serious impairment threshold. *Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004). First, a court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Id* at 131-132.

If there are material factual disputes, a court may not decide the issue as a matter of law. *Moore, supra* at 518. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, whether plaintiff's injuries constitute a serious impairment of body function is a matter of law. MCL 500.3135(2)(a); *Kreiner, supra* at 132.

Evidentiary Documentation

On the day the accident occurred, plaintiff was on her way to the first day of her new job as a drill press operator. Prior to that, she had not worked outside the home for ten years. She was widowed in 2002. Plaintiff stated she worked a total of 92 days at the drill press job until she lost it "over not being able to work." Plaintiff explained also that she had a quota to meet which she could not do, so she was let go. Plaintiff stated that she had been talked to about not meeting her quota on a couple of occasions before being let go. She could not work fast enough because she did not have the strength to pull in the parts, or lift the shield door and had to have others do those things for her, which slowed down her production. Plaintiff stated she had told her supervisors that she had been injured in an auto accident the day she started work. She also stated that she believes she re-injured herself, or her injuries just worsened due to the job, but she did not apply for worker's compensation. Plaintiff stated that she has not sought another job since she left that employment.

Plaintiff stated that the accident caused injury to her neck "going down into my back," "right in the middle like." Plaintiff stated she did not notice any pain until the day after the accident. It was not until June 9th, 2004, that she went to her doctor due to pain in her back. She was referred to physical therapy but did not go because she could not pay for it, and she had no medical insurance.

On February 10, 2005, plaintiff underwent an IME with Joseph Femminineo, MD. His diagnosis was that of myofascial strain with benign clinical examination. He saw no contraindication for plaintiff to return to any vocational or avocational activity that predated the accident. The physician also stated he saw no evidence of any objective long standing pathology, no need for medical treatment and no need for any household chore services.

Plaintiff underwent an MRI on March 29, 2005. The final impression indicated mild circumferential disc bulges at the C3-4, C4-5, and C5-6 levels mildly effacing the thecal sac anteriorly. Further, the MRI showed the spine was otherwise normal. The diagnostic reports of her personal physician, Robert Tam, DO, indicate on April 4, 2005 that plaintiff had been in his care for a post-traumatic arthritis and disc disease that he believes were slow in occurring but were either initiated by or aggravated by the motor vehicle accident. The report indicated that she was unemployable at that time. However, a report dated July 19, 2004 indicated that Dr. Tam saw plaintiff for the first time regarding this injury on 6/9/2004, again on 6/18/2004, and noted "has returned to work and I am not aware of her condition as of 7/13/2004." The report indicated that plaintiff was able to perform routine household chores, did not require attendant care, was not disabled, and had not been hospitalized. The diagnosis, while for the most part indecipherable, stated, "Cervical flexion & [indecipherable]".

Ronald Rook, DO, of Greater Michigan Orthopaedics and Sports Medicine examined plaintiff on April 7, 2005. He reviewed her x-rays and determined some signs of cervical spondylosis at the C4-5 area. His final impression was cervical spondylosis and whiplash/muscular strain of the cervical spine. He recommended physical therapy, and did not consider surgical intervention to be of any benefit. Dr. Rook's May 5, 2005, report is essentially the same diagnosis.

A supplement to Dr. Femminineo's initial report in February, 2005, indicated that he had reviewed further records of plaintiff as of April 25, 2005. He indicated that his impression of the MRI taken on March 29, 2005, were consistent with early degenerative disc disease, not related to the accident that occurred May 10, 2004.

Analysis

While plaintiff provided one opinion from her treating physician that her arthritis and disc disease were either initiated by or aggravated by the accident, the Court finds this one opinion conclusory at best, and based primarily on plaintiff's subjective complaints, as the physician has failed to explain how he reached that conclusion. Although a plaintiff may recover where the trauma caused by an accident triggers symptoms from a pre-existing condition, *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000), the plaintiff still has the burden to show the causal link between the accident and the aggravation of the preexisting condition. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The neurological and objective physical testing results were for the most part normal with the exception of mild circumferential disc bulges, consistent with early degenerative disc disease.

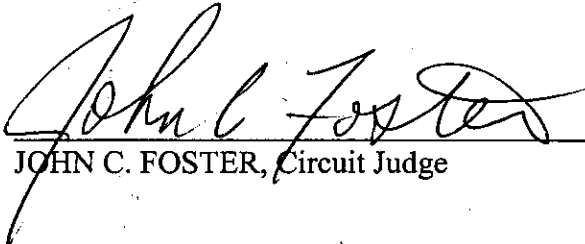
Plaintiff worked until August when she was let go for what she claims was her failure to reach her production quota due to the injuries caused by the accident. She also stated in her deposition that others were let go at the same time, suggesting that workers were laid off because there was not enough work to keep them on the payroll. Plaintiff stated that all those who had been laid off were eventually rehired, and another four or five people in addition, but she was not called back to work. Plaintiff admits that all the time that she was employed, she could not keep up with the production expected of her.

Plaintiff stated that the last time she saw Dr. Tam was in 2005, when he told her she was not able to work, but since that time, no other physicians have told her she could not work, in point of fact, no other doctors at any time told her she could not work. In sum, the Court is not convinced that any evidence provides a basis for finding that plaintiff's condition was caused by the accident. Indeed, plaintiff stated that it is possible that she could have re-injured herself, or

her injuries got worse while she was working. It is insufficient to submit a causation theory that is just as possible as another theory, rather, plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, plaintiff's injuries would not have occurred. Plaintiff's symptoms manifested themselves sometime between the date of her accident which coincided with the date of her first day on the job, and June 9, 2004, when she consulted her physician. The job itself was quite strenuous, and a jury could just as easily infer that it was the job activity that produced the symptoms of a pre-existing condition. Therefore, the evidence is nothing more than speculation and conjecture, which are not sufficient to establish a genuine issue of material fact.

For the above-stated reasons, defendant's motion for summary disposition under MCR 2.116(C)(10) is GRANTED. Pursuant to MCR 2.602(A)(3) The Court states this Opinion and Order resolve all remaining matters and closes the case.

IT IS SO ORDERED.



JOHN C. FOSTER, Circuit Judge

DATED: June 5, 2006

JCF/sw

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